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No. 1384

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

HOWARD H. BALDWIN AND
CLAIR C. WAGNER,

Petitioners,

vs.

UNITED STATES OF AMERICA,
MARVIN C. MESCH AND
DONALD J. ANDERSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. 1384

IN THE
SUPREME COURT
OF THE
UNITED STATES
October Term, 1968

HOWARD H. BALDWIN AND CLAIR C. WAGNER,

Petitioners,

vs.

UNITED STATES OF AMERICA, MARVIN C. MESCH AND DONALD J. ANDERSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

HOWARD H. BALDWIN and CLAIR C. WAGNER, your Petitioners, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case, on March 8, 1969, affirming the United States District Court for the District of Colorado, wherein

Petitioners were convicted of mail fraud in violation of 18 U.S.C. § 1341, in connection with the sale of swimming pool franchises or dealerships.

A Petition for a Rehearing was denied on April 11, 1969.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit entered on March 8, 1969 (Appendix A, infra) has not yet been officially reported.

In upholding the conviction of the Petitioners, the United States District Court for the District of Colorado delivered no formal opinion, merely denying Petitioners' MOTION FOR NEW TRIAL OR IN THE ALTERNATIVE JUDGMENT OF ACQUITTAL.

DATE OF JUDGMENT AND TIME OF ENTRY

The Judgment of the Court of Appeals for the Tenth Circuit was entered on March 8, 1969.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Federal Courts are bound by a State's substantive law in determining the

validity of written contracts in prosecutions for mail fraud in violation of 18 U.S.C. 1341.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 1341:

> § 1341. Frauds and swindles. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94.

Article I, Section 10, United States Constitution:

> Section 10. No State Shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Fifth Amendment to the Constitution of the United States:

> AMENDMENT V--CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONCISE STATEMENT OF CASE

Defendants together with others, allegedly in violation of 18 U.S.C. § 1341, were indicted for mail fraud. The Indictment charged the Defendants, including Petitioners, ". . . devised and intended to devise a scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises from numerous persons . . . being that class of persons engaged in excavating, concrete, plumbing and other types of construction work, who could be induced to execute and enter into Dealership Agreements . . . ." involving the sale and installation of swimming pools.

The Indictment charged that the Defendants would and did make and cause to be made "orally to said persons intended to be defrauded" certain alleged false and fraudulent pretenses, representations and promises, specifically set forth in the Indictment.

Subsequent to allegedly making said oral alleged false and fraudulent pretenses, representations and promises, written franchise "DEALER AGREEMENTS" were executed, covering the very same subject matter as covered by the allegedly oral false and fraudulent pretenses, representations and promises. Said DEALER AGREEMENTS also contained an "integration clause," which read as follows:

> "17. All previous contracts and understandings between the parties are hereby rendered null and void and of no effect. This writing contains the whole agreement between the parties and cannot be orally modified or changed."

During the course of trial parol testimony over the Defendants' objections relating to the alleged oral false and fraudulent pretenses, representations and promises was received into evidence, which directly contradicted the expressed written terms and conditions of said DEALER AGREEMENTS and "integration clause." The Court of Appeals for the Tenth Circuit approved the receipt into evidence of said oral testimony, holding that the Parol Evidence Rule does not apply to criminal prosecutions, stating that the rule is related to proceedings between parties to the contract and their privies, citing Nickles v. U.S., 382 F.2d 258 (10th Cir.) and also noting Shale v. U.S., 380 F.2d 616 (5th Cir.)

REASONS FOR GRANTING THE WRIT

The decision by the Court of Appeals for the Tenth Circuit herein, in upholding the admissibility of Parol Evidence to vary the terms and conditions of the written DEALER AGREEMENTS, has in effect invalidated what otherwise would be, under Colorado law, valid and legally binding contracts. Colorado law clearly recognizes the validity of contractual "integration clauses," the Supreme Court of Colorado stating in Canon City Industrial Stores Co. v. McInerney (Colo., 1922), 71 Colo. 492, 208 Pac. 457, in regard to a contract involved which ". . . warns anyone signing it, that it contains all of the terms of the agreement . . .", that such statement was binding upon one who had signed the contract. In Trujillo v. Wichita Farm Lighting Co. (Colo. 1932), 91 Colo. 307,

14 P.2d 1009, the contract contained language that ". . . [I]t is hereby further expressly agreed by the Purchaser that this instrument contains all the terms, conditions and agreements between the Purchaser and the Company, and that no solicitor, other agent or representative . . . has made any statements, representations or agreements, verbal or written, modifying or adding to the terms, conditions and agreements herein set forth . . ." As to the contractual phrase ". . . that no statements, representations, or agreements, other than those contained therein, had been made or entered into . . .," the Colorado Supreme Court held that there was a right to rely thereon and further stated as to the Purchaser involved:

> ". . . If they had been able to read and write and had failed to do so, but relied upon representations as to the contents, they would not have been relieved from the effects of their agreements, but their failure to read and understand would have been their negligence, to escape which the law would have granted them no relief. (Citations omitted)."

Canon City Industrial Stores Co. v. McInerney, supra, and Trujillo v. Wichita Farm Lighting Co., supra, are cited in 32A C.J.S., Evidence, § 979, as authority for the statement that:

> ". . . There is, however, authority holding that where a written contract, which a party attacks on the ground of the oral fraudulent representations of the other party, contains provisions

> negativing the claim that the representations were relied on, or contains other representations on the same subject inconsistent with the alleged oral representations, the oral representations are inadmissible, as varying the contract . . . ." (Emphasis supplied)

DEALER AGREEMENTS, Exhibit 13E (reproduced at Appendix B) were admittedly executed in Colorado and paragraph 17, as heretofore noted, provided:

> "17. All previous contracts and understandings between the parties are hereby rendered null and void and of no effect. This writing contains the whole agreement between the parties and cannot be orally modified or changed."

In addition to "integration clauses" being valid in the State of Colorado, the "substantive law" of Colorado is that prior oral representations in contradiction to the specific terms and conditions of contracts, e.g. the DEALER AGREEMENTS involved herein, WOULD NOT BE ADMISSIBLE IN EVIDENCE [Snyder v. Board of County Com'rs. of Boulder County (1885), 8 Colo. 377, 8 Pac. 917; Randolph v. Helps (1885), 9 Colo. 29, 10 Pac. 245; Brennan v. Monson (1935), 97 Colo. 448, 50th P.2d 534].

There was no evidence of any fraud in the "execution" of any of the DEALER AGREEMENTS involved in the instant case.

The Parol Evidence Rule being a rule of "substantive law" which is all but universally applied [e.g. Love v. Gulyas (1948, Cal.) 197 P.2d 405; Continental Gin Co. v. Freeman

(1964 D.C. Miss.), 237 F.Supp. 240; Gordon v. Whitthauer (1965, Ia.), 138 N.W.2d 918; and, General Electric Credit Corp. v. Noblatt (1967 D.C. Okla.), 268 F.Supp. 984], the federal Rules of Decision Act (U.S.C. § 1652) would require the United States District Court for the District of Colorado as well as the Court of Appeals for the Tenth Circuit to follow Colorado law, in Civil actions, involving the DEALER AGREEMENTS (Exhibit 13E, Appendix B, infra) and, by virtue of the Canon City Industrial Stores Co. and Trujillo cases, supra, the fact that said DEALER AGREEMENTS contained "integration clauses" would prohibit testimony of alleged ". . . oral fraudulent representations . . ." (32 C.J.S., Evidence, § 979). All prior and contemporaneous negotiations, conversations and representations in such a case, would be deemed to have been merged into the written DEALER AGREEMENTS, under Colorado law [Thompson v. Swain Flour Brokerage Co. (1933), 93 Colo. 268, 25 P.2d 745; Hoffman v. Wichita Farm Lighting Co. (1934), 94 Colo. 153, 28 P.2d 808; Candell v. Western Federal Sav. & L. Ass'n. of Denver (1965), 156 Colo. 552, 400 P.2d 909; Ruskin v. Buehler (1963), 151 Colo. 577, 379 P.2d 809; Sentinel Acceptance Corp. v. Colgate (1967), ____Colo.____, 424 P.2d 380; and, City of Westminster v. Skyline Vista Develop. Co. (1967), ____Colo.____, 431 P.2d 26, as examples].

Thus, in Civil actions either in Colorado State or Federal Courts "Parol Evidence" of the alleged ". . . false and fraudulent pretenses, representations and promises . . ." alleged in

the Indictment herein would not be admissible by virtue of the "substantive law" of Colorado as laid down by the Supreme Court of the State of Colorado giving validity and vitality to contractual "integration clauses" under the Parol Evidence Rule, [Canon City Industrial Stores Co. v. McInerney, supra, and Trujillo v. Wichita Farm Lighting Co., supra]. Consequently, no civil fraud based on alleged fraudulent oral false pretenses, representations, and promises could be shown, as the essential element of "reliance" in a scheme to defraud would be absent, repudiated, and negated by paragraph 17, "the integration clause" of the DEALER AGREEMENTS.

Since elements of fraud as developed in civil cases are applicable to determine whether or not there was, in fact, a scheme to defraud in mail fraud cases in violation of 18 U.S.C. § 1341 [Epstein v. U.S. (C.A. Mich., 1949), 174 F.2d 754 and U.S. v. Buckner (C.C.A.N.Y., 1940), 108 F.2d 921, cert. den. 60 S.Ct. 613, 309 U.S. 669], proof of "reliance" to establish an alleged artifice or scheme to defraud in the instant case was essential.

The Court of Appeals herein, in its opinion (Appendix A, infra) avoided the effect of Colorado law and Colorado's application of the Parol Evidence Rule and contractual integration clauses by the simple expedient, in reliance upon Nickles v. United States, supra, and Shale v. United States, supra, of holding that the Parol Evidence Rule does not apply to criminal prosecutions, the Court further stating in regard to Nickles v. United States, supra, that:

". . . We there said that oral testimony is admissible to show the presence of fraud, despite proof of execution of contracts relating to the transaction . . ."

Further, in its opinion, the Court of Appeals herein, stated:

"The record contains adequate evidence to show that the victims relied upon the representations [orally] made during the course of the visits to Denver. This appears through the direct testimony of a number of the principal witnesses." (See Appendix A, infra)

Whereas Nickles v. United States, supra, and Shale v. United States, supra, broadly state, in effect, that the Parol Evidence Rule is not applicable in criminal cases, this is contrary to the rule in a majority of the jurisdictions as stated in 23 C.J.S. Criminal Law, § 857 where at pg. 372, it is stated:

". . . [I]n the majority of jurisdictions the courts apply the rule together with its exceptions and limitations."

Counsel has found no Colorado case holding that the Parol Evidence Rule does not apply in criminal prosecutions (Colo. Digest, Crim. L., Key No. 447). On the contrary, Canon City Industrial Stores Co. case, supra, and the Trujillo case, supra, evidence a strong public policy in the State of Colorado that integration clauses such as paragraph 17 in the DEALER AGREEMENTS involved herein are valid and binding. This was not a situation where DEALER AGREEMENTS were merely one of a series of evidentiary facts bearing upon the ultimate question of whether a scheme

or artifice to defraud had been devised [Cf. Preeman v. U.S. (7th Cir. 1917), 244 F. 1] but as seen by the Indictment herein, the entire scheme was allegedly based on alleged oral false and fraudulent pretenses, representations, and promises allegedly made prior to execution of the written DEALER AGREEMENTS. The validity of said DEALER AGREEMENTS should have been determined by substantive Colorado law. Had this been done the integration clause of said DEALER AGREEMENTS under the Parol Evidence Rule as applied in Colorado, would have barred all testimony relative to prior oral alleged false pretenses, representations, and promises. Either said DEALER AGREEMENTS were valid or invalid regardless of whether the type of action was of a civil or criminal nature.

The effect of the opinion of the Court of Appeals herein in permitting testimony in direct contradiction to the written provisions of the DEALER AGREEMENTS and the integration clause contained therein, contrary to the substantive law of the State of Colorado, is to permit for federal criminal purposes the invalidation of said DEALER AGREEMENTS which, otherwise, under state law are valid and binding for civil purposes. Consequently, the said opinion herein of the Court of Appeals has decided an important state question as to the validity of written contracts contrary to State law.

Illustrative of the end result of the opinion of the Court of Appeals herein, if same stands unreversed, is the fact that one and the same contract is valid on the basis of the substantive state law in both the Colorado State and Federal Courts for civil purposes but a fraudulent

artifice or scheme to defraud for federal criminal purposes.

It is not difficult to foresee (in the event that the Court of Appeals opinion herein stands unreversed) a dissatisfied judgment debtor in either Colorado State or Federal Courts obtaining his revenge against his judgment creditor by the simple expedient of claiming false and fraudulent oral pretenses, representations, and promises were made prior to the execution of the written contract on which said judgment is based together with the use of the mails, i.e., a violation of 18 U.S.C. §1341, and the ultimate possibility of a conviction for mail fraud of the judgment creditor. The potential breakdown of the sanctity of written contracts in case of disputes between the contracting parties and potential fear of civil enforcement of said written contracts because of potential criminal reprisals, is readily foreseeable if the opinion of the Court of Appeals herein is not reversed. The judgment creditor faces the possibility in such a situation of finding himself in the penitentiary while at the same time his attorney seeks to collect a valid judgment based on the same contract resulting in his client's conviction for mail fraud. The fact that the Rules of Decision Act does not apply to criminal proceedings surely was never intended to lead to such an anomalous situation.

By permitting the introduction of the oral testimony by the Trial Court and approval of same by the Court of Appeals herein, to vary and directly contradict the expressed written terms of the DEALER AGREEMENTS and integration clause, in violation of the Parol Evidence Rule, as applied by the law of the State

of Colorado, the effect of the opinion of the Court of Appeals herein is to infringe on Petitioners' "property" rights as guaranteed by Article I, Section 10 of the Federal Constitution, the contract clause, which are protected under the Fifth Amendment to the Constitution of the United States [Miller v. Howe Sound Min. Co. (D.C. Wash., 1948), 77 F.Supp. 540, 545], it being noted in North Texas Producers' Assoc. v. Young (5th Cir., 1962), 308 F.2d 235 to 243, that:

> ". . . A valid contract is property. Miller, et al. v. Howe Sound Min. Co., (D.C.E.D. Wash.), 77 F.Supp. 540; Deutsche Bank, etc. v. Cummings, (C.C.A.D.C. 1936), 83 F.2d 554; Lynch v. United States (1943), 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434. The last cited cases, from courts of all levels, conclusively hold that valid contracts are 'property'."

The effect of the opinion of the Court of Appeals herein is to hold that the DEALER AGREEMENTS made in and governed by Colorado law are fraudulent so far as concerns 18 U.S.C. § 1341, even though valid and binding under Colorado law for civil enforcement purposes. Petitioners maintain, that the effect of said ruling is to infringe upon their property and contract rights as guaranteed by Article I, Section 10 and the Fifth Amendment to the Constitution of the United States.

Petitioners further maintain that the opinion of the Court of Appeals herein conflicts with the decision in Bergera v. United States (8th Cir., 1924), 297 F. 102, which held it to be

error to permit a witness, who wrote letters to the defendant, to testify as to the sense in which he had used a certain expression, although not prejudicial under the circumstances.

Nickles v. United States, supra, involved a case arising out of the State of Utah, and never considered the "substantive law" of the State of Utah, but relied upon Pennok Oil Co. v. Roxana Petroleum Co. of Oklahoma, (8th Cir., 1923), 289 F. 416, which arose out of the State of Oklahoma and which never considered the "substantive" law of the State of Oklahoma. Shale v. United States, supra, arose out of the State of Florida and never considered the "substantive" law of the State of Florida, and Gibson v. United States (Dist. Col. C.A., 1959), 268 F.2d 586, relied upon in the Shale case, supra, never considered the "substantive" law of the District of Columbia, and further it was evident that one of the parties to the contract involved was "mistaken" and believed that the written contract conformed to the oral agreement, which is not the situation in the instant case.

The opinion of the Court of Appeals herein, raises very serious implications as to the rights and obligations of parties to written contracts and permits dissatisfied parties who knowingly made written contracts to disavow same despite the lack of any ambiguity in the terms and conditions of said contract by claiming oral promises and representations and statements in direct conflict with the written terms and conditions of their contracts.

This Court, so far as counsel has been able to ascertain, has never decided the question as

to whether or not the Federal Courts in federal criminal prosecutions can ignore state substantive law as to the validity of written contracts and vitiate valid and binding contracts under state law by permitting oral testimony contradictory to the expressed terms and conditions of written contracts contrary to the state's application of the Parol Evidence Rule.

Because of the importance of the impact of the opinion of the Court of Appeals herein on the validity of written contracts and resulting uncertainties as to contractual relations in commercial transactions, this Court should make a determination respecting the validity of valid and binding written contracts under state law insofar as concerns federal courts in actions involving federal criminal prosecutions.

CONCLUSION

Petitioners respectfully submit that a valid written contract under state law, binding in state courts and federal courts sitting in such state, should be binding in federal criminal prosecutions and that a valid written contract in civil actions should be valid in criminal prosecutions as either such contract is valid or invalid, but may not be valid as between the parties and invalid between the government and one party. Otherwise a double standard as to the validity of written contract exists and the right to contract and property rights therein are infringed by the potential imposition of criminal sanctions contrary to the constitutional guarantees under Article I,

Section 10, and the Fifth Amendment to the Constitution of the United States.

Respectfully submitted,

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APPENDICES

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Decision by the Court of Appeals for the Tenth Circuit Affirming District Court 19

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
February 1969 Term

MARVIN C. MESCH, Appellant,	)	
v.	)	No. 10051.
UNITED STATES OF AMERICA, Appellee.	)	
DONALD J. ANDERSON, Appellant,	)	
v.	)	No. 10183.
UNITED STATES OF AMERICA, Appellee.	)	
HOWARD H. BALDWIN, Appellant,	)	
v.	)	No. 10184.
UNITED STATES OF AMERICA, Appellee.	)	
CLAIR C. WAGNER, Appellant,	)	
v.	)	No. 10185.
UNITED STATES OF AMERICA, Appellee.	)	

APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLORADO
(District Court No. 66-CR-243)

Jack I. Scheiman, Denver, Colorado, for Appellant Marvin C. Mesch, in No. 10051.

Dennis L. Blewitt, Boulder, Colorado, for Appellant Donald J. Anderson, in No. 10183.

Francis R. Salazar, Denver, Colorado, for Appellant Howard H. Baldwin, in No. 10184, and Appellant Clair C. Wagner, in No. 10185.

Before LEWIS, HILL, and SETH, Circuit Judges.

SETH, Circuit Judge.

Appellants were convicted of using the mails to defraud in violation of 18 U.S.C. § 1341, and have taken these appeals. They assert similar positions on appeal and the cases have been consolidated.

The record shows that Appellants Howard H. Baldwin and Clair C. Wagner conceived the idea of forming several corporations for the

purpose of selling swimming pools or franchises or agencies for swimming pools. The sales were to be to persons who believed they were to become dealers and installers for the pools. The business of the several corporations was conducted at the same location, but several mailing addresses were used. The two above-named appellants undertook to supervise the important activities of the corporations with which we are here concerned.

Appellant Marvin C. Mesch was a general manager of several of the corporations, and appellant Donald J. Anderson acted as a corporate officer or agent for the corporations.

The record establishes that the appellants sought names of prospects from the classified sections of telephone books of communities located in several western states. They would select names of building contractors, plumbers, dirt moving contractors, concrete dealers, and others engaged in similar businesses. The persons so selected would be told that one of the corporations was about to begin business in their area and it was necessary to find a person to install the pools to be sold. If this contractor indicated that he would do such work, then he would be asked to submit an estimate of the cost of installing a pool. He would be later asked whether he would submit an estimate for all pools in his locality, and if the interest continued, it would be suggested that it might be to his financial interest to become a dealer for the swimming pools handled by the corporation in addition

to doing the installation work. The contractor would then be asked to come to Denver to discuss the matter further with officers of the corporation, and he was told his expenses would be borne initially by him and he would be later reimbursed by the corporation. Upon arrival of the contractor in Denver, he was taken to various locations and shown swimming pools which appellants represented to have been installed by their corporation. During the course of further discussions at the time of these visits in Denver, the contractor would be told by the various representatives, among other things, that (1) the company had made arrangements to finance the purchasers of pools in the contractor's area under discussion; (2) that company-employed salesmen would do all the actual selling to prospects in the area; (3) that the companies would at their sole expense provide all the advertising for sales in the area; (4) that a sample pool would be installed at the expense of the company at a location selected by the contractor and the company as a device to promote sales, and that the contractor's cost of installing this pool would be reimbursed by the company upon completion of the pool; (5) that the company-employed technicians would help supervise the pool installations at the outset to assist the contractor; (6) the contractor was also told that swimming pools had already been sold in the territory under discussion and that the dealer would receive a profit from these sales already made.

The discussion with the contractor would next turn to the matter of initial deposits to be made by the prospective dealer. Various sums would be suggested, and after some negotiations an amount of deposit to be made by the prospective dealer was agreed upon. This amount was usually about $3,000.00. A portion of this deposit was to be repaid to the contractor as each pool was sold. When the negotiations had progressed to this point, a written "dealer contract" was proposed and was executed by the parties. This written agreement contained few of the details which had been the subject of the previous discussions. On execution of the contract, the contractor was directed to return to his area and commence the preliminary work for the installation of the sample pool. The contractor was requested to notify the company when the preparations were complete and the components of the pool would then be sent to him.

The record shows that when the contractor advised the company he was ready for the pool components, he would be asked for a deposit on the pool, and if he forwarded this deposit, the pool would be sent to him COD for additional charges of between $2,000.00 and $3,000.00. If the dealer objected to this COD, he would be advised that he would be reimbursed for the pool costs by a ten percent credit on each pool thereafter purchased by him.

The record shows that the representations which are enumerated above which were made to the contractor prior to his execution

of the agreement were not carried out by the appellants or their corporations. Some three hundred dealerships were sold during the period covered by the record in this case, and it shows that in most instances the dealerships not only put up the good faith deposit but they also were induced to accept the COD shipment of the sample pool. If they did not pay the COD charges, they were cancelled out as dealers and their deposits retained. No advertising program was ever conducted, no salesmen were sent to sell in the area covered, and no sales to the public were ever made. The contractors did not recover their trip expenses and good faith deposits, nor the COD charges. No technical assistance or engineering services were provided.

On this appeal appellants assert several points as the basis for reversing the trial court. These positions briefly are as follows:

1. That the trial court violated the parol evidence rule by admitting in evidence testimony concerning the pre-contract conversations and representations made by the appellants.

2. That there was no evidence introduced to show that the contractors relied upon the representations and promises made by appellants.

3. That the trial court committed a reversible error by submitting to the jury a form of verdict for a corporation, the charges against which had been dropped during the course of the trial.

4. That the instructions given by the trial court relative to misrepresentations were incorrect.

5. That the instruction relative to honest mistake and good faith was inadequate.

6. That the jury did not follow the court's instructions and that the prosecuting attorney acted improperly during the course of the trial.

7. The appellant Mesch argues that there was no defrauding by reason of the fact that the pools received were of the value represented.

8. Appellant Anderson argues that there was insufficient evidence relative to his participation.

As to the first point above referred to relating to the parol evidence rule, there is adequate authority in this Circuit and elsewhere that the rule does not apply to criminal prosecutions of this nature, as it relates to proceedings between parties to the contract and their privies. We so held in Nickles v. United States, 381 F.2d 258 (10th Cir.). We there said that oral testimony is admissible to show the presence of fraud, despite proof of execution of contracts relating to the transaction. See also Shale v. United States, 388 F.2d 616 (5th Cir.).

The record contains adequate evidence to show that the victims relied upon the representations made during the course of the visits to Denver. This appears through the direct testimony of a number of the principal witnesses.

It appears that the form of verdict relating to Cinderella Pool Corporation of Illinois was mistakenly submitted to the jury as the charges against it had been dropped. The form

of verdict which was intended to be submitted related instead to Cinderella Pool Corporation of Colorado. The parties were not aware of the mistake at the time that the forms of verdict were reviewed prior to their submission. When the jury returned, the bailiff read the name, Cinderella Pool Corporation of Illinois, and the court thereupon stopped the proceedings and withdrew the form mistakenly submitted, and thus no verdict was ever taken as to this corporation. By reason of the confusion of names no form of verdict was submitted as to the Colorado corporation, and the prosecution dismissed the indictment as to this corporation rather than to resubmit the case to the jury for its consideration. We find no reversible error arising from the submission of the forms of verdict. There is no charge of conspiracy as each of the individual appellants was charged with a substantive offense. The authorities submitted by the appellants on this point relate basically to conspiracy cases and are not persuasive. Nor do we find in this event any failure on the part of the jury to follow the instruction of the court nor any prejudice to appellants.

The appellants urge, as above indicated, that the court's instructions relating to fraud and misrepresentation were erroneous. This point relates principally to the refusal by the trial court to give an instruction tendered by the appellants to the effect that misrepresentations to be actionable must relate only to an existing or past fact. The court considered the tendered instruction but decided that the instruction was not justified in view of the

proof. We agree. It is apparent from the record that many promises as to future undertakings by the appellants and the corporations were made, but there were also false representations as to past and present facts. These existing facts include representations that the company had a plan to finance the purchasers, that the company had advertising that was ready for distribution, that the company had a trained sales force, and that the company had installed particular pools in Denver, which in fact they had not. In view of the nature and extent of these misrepresentations, it is not necessary under the record to consider the effect of representations as to the future course of action to be taken by the appellants or the corporations.

The appellants also urge that the trial court did not correctly instruct the jury as to good faith or honest mistake. It is apparent from the recent decisions of this court that the instruction relative to good faith must be clear and complete. See Sparrow v. United States, 402 F.2d 826 (10th Cir.); Steiger v. United States, 373 F.2d 133 (10th Cir.); Beck v. United States, 305 F.2d 595 (10th Cir.); and Hawley v. United States, 133 F.2d 966 (10th Cir.). We have examined the instruction here given by the court in view of the proof submitted and find that it is adequate and clear under the above authorities.

It does not seem necessary to discuss at length the additional objections made by the several appellants, as we have examined each and find no error.

As indicated above, the Appellant Mesch makes an additional argument relating to the value of the pools which were received by the several contractors. He urges that these pools were equal in value to the price paid. This, however, is not the issue tried below. It is apparent that the contractor did not intend to buy a swimming pool but instead that he intended to become a dealer and installer in the context of the representations that had been made to him. As it turned out, the plan or scheme was one to sell swimming pools to the dealers, and thus they were induced to get something other than they bargained for and something other than was represented to them. Rude v. United States, 74 F.2d 673 (10th Cir.).

The evidence was sufficient to show adequate participation in the scheme and plan by all of the individual Appellants including the Appellant Anderson. Each participated and had a responsible position with reference to the corporations and to the activities which are the basis for the indictments. The record shows that each of the individual defendants were aware of the entire scheme and fully participated therein. We find no error.

AFFIRMED.

APPENDIX B

(Illustrative) *

D E A L E R A G R E E M E N T

THIS AGREEMENT, MADE this ____ day of _____, 19___, in the city of_____, between Bermuda Pools, Inc., hereinafter called Company, and _____, hereinafter called "Dealer."

WHEREAS, the Company deals in the sale at wholesale of swimming pool liners, filters and pool supplies, and

WHEREAS, the Company has developed and established uniform methods of advertising, publicity, techniques and technical knowledge, skills and operating experience for conducting the sale and installation of swimming pools to the general public, and

WHEREAS, Dealer requests and the Company is willing, upon the terms and conditions hereinafter set forth, that Dealer enter into and conduct in a specific territory the sale and service of Bermuda Pools and supplies;

NOW, THEREFORE, in consideration of the foregoing and of the mutual promises hereinafter made by the parties hereto, IT IS AGREED AS FOLLOWS:

1. Company hereby appoints Dealer and Dealer agrees to act as Dealer for one (1) year ensuing for the sale and service of Bermuda Pools in the following territory:_____

_____.

---

* Exhibit 13E, except blanks filled in on Exhibit have been left blank.

Upon completion of _____ pool installation(s) in the aforementioned time period said Dealer is automatically granted an additional three (3) year option.

2. Company agrees to furnish liners, filters and other pool supplies to the Dealer on the terms agreed upon herein. Dealer agrees to purchase all liners, filters and supplies from the Company. Dealer agrees to use its best efforts to obtain as many sales as possible.

3. Dealer agrees to have in his possession at all times one or more models of Bermuda Pools.

4. Company agrees to sell Bermuda Pools to Dealer at net prices F. O. B. Denver, Colorado, which net prices are to be established by Company and notice thereof given to Dealer. Company reserves the right to change net prices at any time and agrees to give Dealer immediate notice of any such changes.

5. Dealer shall establish retail prices for Bermuda Pools in the territory granted to it under this agreement. Dealer may sell at retail in the territory at the retail prices established by it.

6. Company agrees to ship Bermuda Pools to the Dealer or its authorized subdealers upon sufficient deposit to cover cost of pool and freight charges. Pools delivered by Company will be at Company's risk until delivery is made, but all pools delivered by common carrier or by facilities supplied by Dealer will be at other than Company's risk after delivery to such carrier is made.

7. All pools sold by the Dealer shall carry a five year warranty on the pool liner--one (1) year unconditional and four (4) years pro-rated.

8. The Company will pay 50% of the Dealer's advertising cost in an amount not to exceed 5% of the Dealer's purchases from the Company, provided that the dealer submits proper proof of advertising and a copy of the paid bill from the advertising media.

9. Company agrees to furnish blueprints, sales circulars, sales ideas and campaign promotions.

10. Dealer agrees not to handle or sell, during the continuance of this agreement, any swimming pools except those furnished by the Company.

11. To secure the considerations and help outlined in this agreement the Dealer agrees to deposit a sum in the amount of____ _____Dollars, to be applied at the rate of $_____ on the next _____ pool kits purchased by the Dealer from the Company until such time as the deposit is completely credited. It is mutually agreed that this deposit is refundable to the Dealer only as a credit on purchases as set forth herein.

12. Dealer agrees that for a period of one (1) year after the expiration of the term of this agreement, he will not engage in the construction and/or sale of swimming pools and allied pool supplies in the territory covered by this agreement.

13. Dealer agrees not to use the name "Bermuda Pools" or "Pools by Bermuda" or

word "Bermuda" in his business name, private or corporate, but can use the words "Local Bermuda Pools Dealer" in conjunction with his business or corporate name for the duration of this agreement.

14. In the instance where the Dealer is acting as an agent for a proposed corporation to be formed, the corporation upon granting of a Charter by the State shall immediately become the Dealer thereafter. Personal responsibility of the Dealer shall cease upon formation of said corporation and notice of the same being forwarded to the Company.

15. This agreement is not assignable by the Dealer without written consent of the Company. War, national emergency, civil commotion and acts of God which render impossible performance by either party will not be reason for cancellation of this contract.

16. Failure of the Dealer to perform any of the terms of this agreement except for reasons set forth in Paragraph 15 shall be cause for cancellation of this agreement upon ten (10) days' written notice to the Dealer at his usual place of business.

17. All previous contracts and understandings between the parties are hereby rendered null and void and of no effect. This writing contains the whole agreement between the parties and cannot be orally modified or changed.

WITNESSES: DEALER:

_____ _____

_____ _____

APPROVED: BERMUDA POOLS, INC.

By: _____

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1384

HOWARD M. BALDWIN AND CLAIR C. WAGNER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 407 F.2d 1286.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1969. A petition for rehearing was denied on April 11, 1969. The petition for a writ of

certiorari was filed on May 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the parol evidence rule, recognized as a matter of state contract law, requires the exclusion from a federal mail fraud prosecution of evidence of misrepresentations made to induce victims of the scheme to enter into superseding written agreements.

STATEMENT

After a jury trial in the United States District Court for the District of Colorado, petitioners (with others) were convicted of several counts of mail fraud (18 U.S.C. 1341) in connection with a scheme involving the sale and installation of swimming pools. They were each sentenced to concurrent three-year terms of imprisonment, the court directing that six months be served and the remainder suspended and spent on probation. The court of appeals affirmed (Pet. App. A).

The sufficiency of the evidence, set forth in detail in the opinion below, is not here challenged. It showed in summary that petitioners conceived the idea of forming several corporations for the purported purpose of selling swimming pools or franchises for swimming pools. They contacted numerous building contractors and others engaged in similar businesses who could install the pools. Various representations were made to these contractors to induce them to become "dealers" for the pools—*e.g.*, as summarized by the court below (Pet. App. A, 22), "that (1) the com-

pany had made arrangements to finance the purchasers of pools in the contractor's area under discussion; (2) that company-employed salesmen would do all the actual selling to prospects in the area; (3) that the companies would at their sole expense provide all the advertising for sales in the area; (4) that a sample pool would be installed at the expense of the company at a location selected by the contractor and the company as a device to promote sales, and that the contractor's cost of installing this pool would be reimbursed by the company upon completion of the pool; (5) that the company-employed technicians would help supervise the pool installations at the outset to assist the contractor; [and] (6) * * * that swimming pools had already been sold in the territory under discussion and that the dealer would receive a profit from these sales already made." The prospective dealer was then induced to make a deposit showing good faith, usually in the amount of about $3000. Thereafter the parties executed a written contract (set forth at Pet. App. B, 29-33), incorporating only a few of the details which had been previously discussed and containing the following final paragraph (Pet. App. B, 32):

> All previous contracts and understandings between the parties are hereby rendered null and void and of no effect. This writing contains the whole agreement between the parties and cannot be orally modified or changed.

The newly appointed "dealer" was then directed to notify the company when preparations for the installation of the sample pool were complete and the com-

ponents would be sent to him. When the contractor so advised the company, he would be asked for a deposit on the pool. If he forwarded this deposit, the pool would be shipped to him c.o.d. for additional charges of between $2000 and $3000. Some three hundred dealerships were sold during the period embraced by the charges in this case and in most instances the dealers were induced both to put up the good-faith deposit and to accept the c.o.d. shipment of the sample pool. No advertising program was ever conducted, no salesmen were sent to sell in the area covered, and no sales to the public were ever made. The contractors did not recover their good faith deposits or the c.o.d. charges. No technical assistance or engineering services were provided. The company in fact had no plan to finance purchases, as had been represented, nor did it have any advertising ready for distribution or any trained sales force. Nor had it installed the particular pools it claimed credit for. See Pet. App. A, 24, 27.

ARGUMENT

Petitioners' sole contention is that the federal mail fraud statute under which they were convicted was improperly applied because the oral misrepresentations would not have been admissible in a breach of contract suit in the Colorado state courts to supplement the terms of the written dealership agreements. The fact that the parol evidence rule would prevent such use of the underlying misrepresentations in a civil suit *by the victims* of the scheme does not, however, insulate petitioners from prosecution by the federal

government for mail fraud. As was said in *Gibson* v. *United States*, 268 F.2d 586, 589 (C.A.D.C.), quoting from a California decision, *People* v. *Chait*, 159 P. 2d 445, 454 (Cal. Dist. Ct. App.):

> The people prosecuting for a crime committed in relation to a contract are not parties to the contract and are not bound by it. They are at liberty in such a prosecution to show the true nature of the transaction.

The federal courts have uniformly held, in accordance with this principle, that Congress, in enacting the mail fraud statute, did not intend its scope to be circumscribed by the substantive laws of the various states with regard to the use of parol evidence to modify the terms of a contract. *Shale* v. *United States*, 388 F.2d 616, 618-619 (C.A. 5), certiorari denied, 393 U.S. 984; *Nickles* v. *United States*, 381 F.2d 258, 260 (C.A. 10).

The purpose underlying the mail fraud statute—to prevent the utilization of the mails in furtherance of a "scheme or artifice to defraud"—necessitates a uniform *federal* standard which, as stated in *Gibson*, *supra*, requires consideration of the entire transaction, including the misrepresentations made by a wrongdoer to induce his victim to enter into a written contract. Illustrative of this basic policy, manifestly within the constitutional power of Congress, are *Durland* v. *United States*, 161 U.S. 306, and *United States* v. *Comyns*, 248 U.S. 349, interpreting predecessor statutes to 18 U.S.C. 1341 as using the term "false pretenses" in a generic sense, without regard to state law, to reach not only the common law

crime of misrepresentation of an existing fact, but also the use of the mails to make a promise as to future conduct, not intended to be kept.[1]

Moreover, it should be noted, petitioners' assertion that Colorado law affords no remedy to the victims of this scheme seems far from indisputable. While the parol evidence rule would prevent the victims from using the oral misrepresentations, not incorporated in the written agreement, to support an action for breach of contract, a suit to void the contract and recover monies paid might well lie on a theory that there was fraud in the inducement. See *Timbers* v. *Mitchell*, 75 Colo. 430, 226 Pac. 149. In any event, state rules governing the enforceability of contracts cannot restrain the sweeping coverage of the federal statute designed to close the mails to anyone who would use them to execute "any scheme or artifice to defraud" or any attempt to obtain money or property "by means of false or fraudulent pretenses, representations, or promises * * *."

[1] The present mail fraud statute made no change in this regard. See *United States* v. *Painter*, 314 F.2d 939, 943 (C.A. 4).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 352153° 725